IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 98 of 1991

For Approval and Signature:

HON'BLE MISS JUSTICE R.M. DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KASTURBEN GORDHANDAS MISTRY

Versus

GLOBE ENGINEERING CORPORATION & Ors.

Appearance:

1. Civil Revision Application No. 98 of 1991

MR SURESH M SHAH for

MR MEHUL S SHAH for Petitioner

MR AJ SHASTRI for Respondents No. 1,2

MR RA MISHRA for Respondent No. 3

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT

Date of decision: 26/04/2005

ORAL JUDGEMENT

Feeling aggrieved by the judgment and order dated 29th October, 1990 passed by the learned Extra Assistant Judge, Rajkot in Civil Appeal No. 117 of 1984, the appellant-plaintiff in Civil Suit No.44 of 1982 has preferred the present Revision Application under Section 29 (2) of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947 [hereinafter referred to as, "the Rent Act"].

The plaintiff is the owner of the suit premises situated near Bhaktinagar Railway Station at Rajkot comprising two rooms, shed and a courtyard. Under the Rent Note dated 3rd September, 1968 [Exh. 42], the suit premises was leased to the defendant no. 1-Globe Engineering Corporation, a partnership firm in which the defendants no.2 to 6 were the partners. The defendants nos. 1 to 6 had taken the suit premises on monthly rent of Rs.575/= for the purpose of making oil engines by assembling the spare-parts. The Rent Note specifically stipulated that no business or trade other than making the oil engines by assembling the spare parts shall be conducted in the suit premises; that the suit premises shall not be sublet or assigned or transferred to any person; that as and when the said partnership firm was dissolved, the possession of the suit premises should be handed over to the landlord. Later on, at the request made by the tenants, the agreed rent of Rs.575/= was reduced to Rs.405/=.

The plaintiff instituted above referred Civil Suit No.44 of 1982 in the Court of Small Causes, Rajkot for recovery of vacant possession of the suit premises and the arrears of rent due. According to the plaintiff, the defendants had committed breach of the terms of the lease agreement; part of the suit premises was assigned or transferred to the defendant no.7; in contravention of the terms of the lease agreement the defendant no.7 had started manufactory in the suit premises; and that the defendants were in arrears of rent since October, 1980.

The suit was contested by the defendants no.1,2 & 7 by filing written statement Exh.16 and by defendant no. 3 by written statement Exh.23. The defendant no.3 stated that he had resigned from the partnership firm as far back as in the year 1969 and that he was not liable to pay rent for the suit premises. The defendants no.1, 2 & 7 denied the allegations made in the plaint. It was stated that the original partnership firm to which the suit premises was leased was dissolved. The defendants no.3 to 6 had retired from the said partnership firm.

The defendant no.2, one of the original partners had taken his two sons namely Shaileshbhai & Dilipbhai in the partnership firm. One of his sons, Shaileshbhai had taken another partner and had started business in the name and style of Vasant Engineering Works, the defendant no.7. The defendant no.7 was thus the sister concern of the defendant no.1-firm. The furnace was required for casting in assembly of the oil engines.

The learned trial Judge was, by judgment and order dated 7th May, 1984, pleased to dismiss the suit for recovery of possession of the suit premises. The learned Judge was of the opinion that the suit notice in so far as it related to eviction on the ground of arrears of rent was not legal and valid and that the defendants were entitled to protection under Section 12 [3](b) of the Rent Act. It was held that as the defendant no.7 was the sister concern of the defendant no.1, the defendant no.1 could not have sublet or assigned or transferred the suit premises or any part of it to the defendant no.7. As to the change of user, the learned trial Judge was of the opinion that under the lease agreement, there was no restriction on the defendant against manufacturing spare parts of the oil engines in the suit premises.

Feeling aggrieved, the plaintiff preferred Civil Appeal No. 117 of 1984 in the Court of learned District Judge, Rajkot. The appeal came up for hearing before the learned Extra-Assistant Judge. The lower Appellate Court confirmed the finding recorded by the trial Court. It was held that the partners in the defendants no.1 and 7 firms were common. The defendant no.1, therefore, cannot be said to have unlawfully sublet transferred or assigned the suit premises or part of it to the defendant no.7. It is also recorded that the business of the defendant no.1 was preparing oil engines, while the business of the defendant no.7 was preparing oil engines, and therefore, it cannot be said to be a change of user. The lower appellate court accordingly dismissed the appeal. Feeling aggrieved, the plaintiff has preferred the present Revision Application.

Mr. Shah has assailed the judgment of the lower appellate court. He has submitted that the lower appellate court has erred in construing the terms of the lease agreement [Exh.42]. He has submitted that the defendants no.1, 2 & 7 had, in their written statement, admitted that the suit premises was being used for manufacturing spare-parts of oil engines. In the face of the said admission, the lower appellate court has erred in holding that the business of the defendant no.1 and

the defendant no.7 were identical. He has relied upon the Rent Note [Exh.42], written statement [Exh.16], partnership deed [Exh.87], and Certificate of registration of the defendant no. 7 [Exh. 91].

The Revision Application is contested by Mr. Shastri. He has submitted that the suit was bad for non joinder of the necessary parties in as much as the plaintiff did not implead all the partners in the defendant no.1-firm. He has extensively read over the deposition of the defendant no.2 [Exh.85]. He has submitted that the equipments like Lathe machine, furnace, etc. are required for preparation of oil engines from the spare parts. He has, therefore, submitted that the courts below have rightly recorded finding in favour of the defendants and have rightly refused to pass decree for eviction.

As recorded hereinabove, the Rent Note Exh.42 clearly stipulates that the defendant shall carry on the business of preparation of oil engines by assembling spare parts in the suit premises and shall not carry on any other business. The aforesaid negative covenant emphasizes that the defendants were not permitted to carry on any business other than making oil engines by assembling spare parts. Whereas, the defendant no.2 has repeatedly admitted in reply to the suit notice, in the written statement and in his oral evidence that the defendant no. 7 has been manufacturing spare parts of the oil engines. In his oral evidence, he has also stated that for past some years, the defendant no.1 had ceased to make oil engines by assembling spare parts. The panchnama [Exh.56] also proves that the suit premises was being used by the defendant no.7 for manufacturing of oil engine spare parts. In my view, inspite of the aforesaid evidence, both the Courts below have manifestly erred in recording that the business of the defendant no.7 was the same as the business of the defendant no.1 and that the manufacturing of oil-engine spare parts did not contravene the terms of the lease agreement. I am of the view that as the defendant no.1 had ceased making oil engines by assembling spare parts and as the defendant no.1 had allowed the defendant no.7 to manufacture oil engine spare parts in the suit premises, the defendant no.1 had not only changed the user of the suit premises in contravention of specific term of the lease agreement but had also assigned or transferred part of the suit premises to the defendant no.7. The lower appellate court has recorded that, "Shri Shaileshbhai, Dilipbhai, Pragjibhai & Kumudben are the common partners of the defendants no.1 & 7," which is factually incorrect. The

said Shri Shaileshbhai, Dilipbhai & Pragjibhai were the partners in the defendant no.1-firm, while the partners in the defendant no.7-firm were Shri Shaileshbhai and Kumudben. Thus, Shaileshbhai was the only common partner in the defendants nos. 1 & 7 firms. The lower appellate court has also erred in recording that, "..the business of the defendant no.1 is preparing oil engines while the business of the defendant no.7 is also preparing oil engines." As recorded hereinabove, the business of the defendant no.1 was to make oil engines by assembling spare parts. Thus, the business of the defendants no.1 & 7 cannot be said to be the same. Further, neither of the partners in defendant no.7 firm was originally a partner in defendant no.1 firm. Thus, the defendant no.2 first took in a stranger [person who originally was not a partner in defendant no.1-firm] as a partner. The said stranger took another partner and started a new business in the suit premises.

The contention that as the aforesaid Shaileshbhai & Dilipbhai, two of the partners in the defendant no.1-firm, were not impleaded to the suit, the suit was bad for non-joinder of necessary parties, requires to be rejected outright. Order 30 Rule 1 CPC provides, inter alia, that two or more partners claiming or being liable as partners and carrying on the business in India may be sued in the name of the firm of which such persons were partners at the time of accruing of the cause of action.

Mr. Shastri has vehemently argued that it has come on record that the defendant no. 1 did not charge any rent from the defendant no.7. In absence of proof of consideration, the defendant no.7 cannot be said to be the sub-tenant in the suit premises or any part of it. Section 13 (1)(e) of the Rent Act contemplates assignment or transfer by the tenant of his interest in the premises or any part thereof. The said clause (e) does not contemplate, unlike clause (ee), subletting for monetary consideration. Hence, whether the defendant no.1 charged any rent from the defendant no.7 or not, it was indeed liable for eviction for transfer or assignment of its interest in the suit premises or a part of it to the defendant no.7 and for change of user in contravention of the terms of the lease agreement.

In view of the above discussion, the Revision Application is allowed with cost. The judgment and order dated 29th October, 1990 passed by the learned Extra Assistant Judge, Rajkot in Civil Appeal No. 117 of 1984 is quashed and set-aside. The Civil Suit No. 44 of 1982 instituted in the Court of Small Causes, Rajkot is

allowed. A decree for eviction be passed against the defendants. Rule is made absolute.

{Miss R.M Doshit, J.}

Prakash*